

Michael W. Fletcher, OSB No. 010448

Direct Dial: (503) 802-2169

Direct Fax: (503) 972-3869

E-Mail: michael.fletcher@tonkon.com

Christopher J. Pallanch, OSB No. 075864

Direct Dial: (503) 802-2104

Direct Fax: (503) 972-3804

E-Mail: christopher.pallanch@tonkon.com

Stephanie J. Grant, OSB No. 154957

Direct Dial: (503) 802-5736

Direct Fax: (503) 274-8779

Tonkon Torp LLP

888 S.W. Fifth Avenue

Suite 1600

Portland, OR 97204

Attorneys for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

DEPAUL INDUSTRIES, an Oregon non-profit corporation,

Plaintiff,

v.

CITY OF EUGENE, a municipal corporation;
JOHN RUIZ, in his official capacity as the City Manager of the City of Eugene; **BENJAMIN MILLER**, personally and in his official capacity as Assistant City Attorney for the City of Eugene; **LAVENA NOHRENBURG**, in her official capacity as Customer Experience Manager of the City of Eugene Public Library; **CLAYTON STILWELL**, in his official capacity as Purchasing Analyst for the Finance Department of the City of Eugene; and **DOES 1-9**, unknown individuals acting under color of law,

Defendants.

Civil No. 6:18-cv-00320-MC

DEFENDANTS' MOTION TO FILE EX PARTE AND UNDER SEAL MOTION FOR RECONSIDERATION

LR 7-1 Certification

Counsel for Defendants certify that they have conferred in good faith with Plaintiff's counsel by telephone regarding Defendants' Motion to File Ex Parte and Under Seal Motion for Reconsideration, to the extent possible without disclosing the content of privileged material. The parties were unable to resolve the dispute. Plaintiff opposes this Motion.

Motion and Memorandum

On October 17, 2018, this Court ordered Defendants to produce several documents previously designated, or redacted, as privileged. Defendants have prepared a Motion for Reconsideration of a portion of that order: the application of the crime-fraud exception to privilege. Portions of the Motion for Reconsideration, as well as its accompanying declaration and exhibits, reveal the content and subject matter of privileged communications. Defendants move this Court, pursuant to Local Rules 3-7 and 3-8, for leave to file ex parte and under seal their Motion for Reconsideration and accompanying support.

The Motion for Reconsideration addresses the different standard applicable to ordering production of privileged documents under the crime-fraud exception, in contrast to the standard for ordering *in camera* review. In a civil case, the party seeking to vitiate the privilege must satisfy the two-part test of the crime-fraud exception by a preponderance of the evidence—a different and more stringent inquiry than whether to order *in camera* review. *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1094–95 (9th Cir. 2007), *abrogated on other grounds by Mohawk Indus. v. Carpenter*, 558 U.S. 100, 105 n.1, 114 (2009). The parties' prior discovery briefing addressed only whether the court should order *in camera* review of the disputed documents, not whether the City must produce them despite any privileges. (Dkt. Nos. 26, 29.) Further, before production is ordered, the City is entitled to an opportunity to introduce countervailing evidence to defeat the claim of fraud asserted against it. *In re Napster*, 479 F.3d at 1093.

Defendants' Motion for Reconsideration, together with the accompanying declaration and exhibits, apply the above standard for the crime-fraud exception to the attorney-client communications the Court has reviewed *in camera*, and present countervailing evidence. In doing so, the arguments, declaration, and exhibits reveal the content and subjects of privileged communications. In order to avoid waiving the attorney-client privilege over the subjects discussed in these communications, Defendants request leave to file the Motion for Reconsideration and supporting materials *ex parte* and under seal.

Should the Court grant this Motion to File Ex Parte and Under Seal, Defendants are prepared to file a public version of the Motion for Reconsideration, redacting portions of the Motion and omitting the supporting materials. An unredacted version of Defendants' Motion for Reconsideration, along with the supporting materials, will be transmitted to the Court in an *in camera* review envelope by FedEx pursuant to Local Rule 3-8. Defendants request that the Court limit access to the full unredacted Motion for Reconsideration and supporting materials to the Court and Court personnel.

DATED this 24th day of October, 2018.

TONKON TORP LLP

By /s/ Christopher J. Pallanch
Michael W. Fletcher, OSB No. 010448
Christopher J. Pallanch, OSB No. 075864
Stephanie J. Grant, OSB No. 154597
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **DEFENDANTS' MOTION TO
FILE EX PARTE AND UNDER SEAL MOTION FOR RECONSIDERATION** on:

Clifford S. Davidson
cdavidson@sussmanshank.com
Susan S. Ford
sford@sussmanshank.com
Thomas W. Stilley
tstilley@sussmanshank.com
SUSSMAN SHANK LLP
1000 SW Broadway, Suite 1400
Portland, OR 97205-3089
Telephone: (503) 227-1111
Facsimile: (503) 248-0130

Attorneys for Plaintiff DePaul Industries

- ☒ by electronic means through the Court's Case Management/Electronic Case File system on the date set forth below
- ☐ by causing a copy thereof to be e-mailed to each attorney at said attorney's last-known email address on the date set forth below

DATED this 24th day of October, 2018.

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Michael W. Fletcher, OSB No. 010448
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Stephanie J. Grant, OSB No. 154597
Attorneys for Defendants